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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-178

WILLARD E. ROBERTSON,
Petitioner

versus

EDWARD F. WEGMANN, EXECUTOR FOR CLAY L. SHAW, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS

The decision of the United States District Court for the Eastern District of Louisiana is reported at 391 F. Supp. 1353, and appears as APPENDIX D to the petition (page 32). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 545 F. 2d 980 and is reproduced as APPENDIX A to the petition for certiorari (page 14).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on January 24, 1977 and the order denying the request for rehearing was entered on June 20, 1977. The

petition for certiorari was filed on August 1, 1977 and granted December 5, 1977. The jurisdiction of this Court rests on 28 USC 1254(1).

STATUTES INVOLVED

The statutes involved are as stated at page 2 of the brief on behalf of the petitioner.

QUESTIONS PRESENTED

Respondent does not agree with petitioner's presentation of the questions presented and submits that the questions presented are:

1) There being no Federal statutory law of survival of Civil Rights actions, does this lack of survival make the Federal law "deficient in provisions necessary to furnish suitable remedies" for Civil Rights violations?

2) Whether this pending action for damages sustained by plaintiff, Clay L. Shaw, prior to his death survives in favor of the substituted plaintiff, the personal representative of his succession, Edward F. Wegmann, the duly qualified testamentary executor of the Succession of Clay L. Shaw, the original plaintiff, as a matter of Federal common law?

STATEMENT OF THE CASE

The trial court correctly and accurately stated the case, the course of the proceedings conducted in the lower court, and the facts relevant to the issues presented for review (APPENDIX D, p. 32). For additional facts pertaining to the

case, see *Shaw v. Garrison*, 328 F.Supp. 390 (E.D. La. 1971, affirmed 467 F.2d 113, 5th Cir. 1972), most especially the trial court's findings of fact and conclusions of law as set forth in said opinion.

It is interesting to note that Garrison and the other defendants, including the petitioner, have taken great umbrage at the fact that the trial court saw fit in writing its opinion to outline in some detail the present posture of this litigation, which, as it was termed by the trial court, and by many other writers, "one of the most bizarre episodes in American political and legal history". The background of this litigation is essential to a complete understanding of the case, and any statement of the case which does not include a detailed account of the background of the litigation, would be incomplete if, as was held by the trial court, ". . .Shaw surely deserves an opportunity to have his day in court and attempt to clear his name, if only post-humously". The court must have full knowledge of the background of the litigation.

Petitioner and his co-defendants have been highly critical of the trial court's opinion resulting in the issuance of an order denying their motion to dismiss. A reading of the trial court's opinion will reflect that it is a well-reasoned opinion which accurately states the facts of the case, and after a detailed and analytical review of the statutes and jurisprudence, rightfully concludes that there is no impediment to the creation of a Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased.

The appellate court agreed with the trial court and borrowed liberally from Judge Heebe's reasoning in his opinion.

The appellate court termed the facts of the case Kafkaesque. Very briefly stated the late Clay L. Shaw, through his Executor, respondent herein, charges that former District Attorney, Garrison, and other defendants, including petitioner, Robertson, and other citizens of New Orleans, deprived Shaw of his Civil Rights by improperly and illegally linking him with the Kennedy assassination and by conducting, as well as financing, a well publicized investigation and prosecution of him for his alleged role in the Kennedy assassination. The question presented to the court arises because Shaw died after the damage suit was initiated on his behalf, but before the matter was brought to trial. Subsequent to Shaw's death, Edward F. Wegmann, respondent herein, the testamentary executor of Shaw's succession, was substituted as party plaintiff. The original style of the case was, and is, "Clay L. Shaw vs. Jim Garrision, et al", No. 70-466 of the docket of the United States District Court for the Eastern District of Louisiana.

The Fifth Circuit, as did the trial court, held that in view of the fact that the law of Louisiana does not provide for survival of this Civil Rights action, because plaintiff Shaw did not leave any of the designated familial beneficiaries, it was inconsistent with the policy or purposes of the Civil Rights Act and would be rejected, (545 F.2d at 983), and held that the action did survive under the Federal common law of survival in Civil Rights actions in favor of the personal representative of the deceased. The court further stated ". . .such a holding seems required by the policies underlying the Civil Rights laws and the Supreme Court's treatment of survival of actions in analygous contexts."

The defendant, Willard Robertson, petitioned this court for certiorari which was granted on December 5, 1977.

ARGUMENT

I. THE LOUISIANA LAW OF SURVIVORSHIP IS INCONSISTENT WITH SECTION 1988 OF THE CIVIL RIGHTS ACT, AS A RESULT OF WHICH THE COURT OF NECESSITY APPLIED THE FEDERAL COMMON LAW

The Fifth Circuit properly concluded, as did the trial court, that "because Louisiana's survivorship provisions would cause Shaw's pending Civil Rights action to abate, we find that Louisiana law is inconsistent with the broad, remedial purposes embodied in the Civil Rights Act", and decided that it should "decline to apply Louisiana law of survival" (545 F.2d 983). The Fifth Circuit likewise found that the Federal law is silent as to survival of Civil Rights actions and that it must look to the State law as directed by Section 1988. Since the State law would not allow the action to survive, the court refused to apply the State law and held that under the Federal common law, there was an absolute right of survivorship of Civil Rights actions under Section 1983.

The issue before the court involves the interpretation, as well as the application, of 42 USC 1988, which provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Chapter in Title 18 for the protection of all persons in the United States in their civil rights and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or, are defi-

> cient in the provisions necessary to furnish suitable remedies, and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

All concerned agree that the Civil Rights Act is silent as to the survival of actions under Section 1983. Petitioner contends that since the Act is silent as to survival of Section 1983 actions, Congress mandated the courts to apply the State law of survival. If Louisiana's Survival Statute, Article 2315 of the Louisiana Civil Code is applied to Shaw's case, the cause of action would abate. *J. Wilton Jones v. Liberty Mutual Insurance Co.*, 248 So.2d 878 (La. App. 4th Cir. Dec. 1970). Respondent's position is quite simple. The State law is "inconsistent with the Constitution and laws of the United States..." and should not be extended to and govern the court in the trial of this case. The State law is to be applied only if it is hospitable to the claimant. If the State law of the forum state is inhospitable to the survival of the claim, the Federal common law which permits survival, is to be applied.

The courts having recognized that there is a "gap" and a "deficiency" in Section 1988 by virtue of its failure to provide for survival of a Civil Rights action, State law is to be applied only if it is hospitable to respondent's claim. *Brazier v. Cherry*, 293 F.2d 401, CCA 5 1961; *Moor v. County of Alameda*, 1973, 411 US 693, 702, 93 S.Ct. 1785, 36 L.Ed. 2d 596.

Both the trial court and the circuit court found that Louisiana's law is inconsistent with the Broad, remedial purposes of the Civil Rights Act, and declined to apply the Louisiana law of survival, since to do so, would leave the plaintiff without a remedy in either the Federal or State courts. The court said:

> "Because Louisiana's survivorship provisions would cause Shaw's pending Civil Rights action to abate, we find that Louisiana law is inconsistent with the broad, remedial purposes embodied in the Civil Rights Acts - laws designed to insure to all citizens 'the right to be free from deprivation of Constitutional Civil Rights' ". *Brazier v. Cherry*, 293 F.2d at 409. We therefore decline to apply the Louisiana Law of Survival. As the Supreme Court said in *Moor v. County of Alameda* (Section 1988) expressly limits the authority granted Federal courts to look to the common law, as modified by State law, to instances in which that law is not inconsistent with the Constitution and laws of the United States. 411 US 706, 93 S.Ct. at 1794. The phrase 'laws of the United States' must be read to encompass the Civil Rights Statutes. It would be specious reasoning at best to suggest that Congress was concerned about the possibility that in enforcing the Civil Rights Statutes, State law inconsistent with tangenital Federal law might be relied upon, but was not concerned about the possibility of hostile State law interferring with carrying out

the purposes of the Civil Rights Acts themselves. See *Monroe v. Pape*, 1960, 365 US 167, 81 S. Ct. 473, 5 L.Ed. 2d 492."

It is well established that the policy of the Civil Rights Laws favors survival of the action. The Louisiana statute limits the classes of persons in favor of whom an action can survive. Hence, as was stated by the trial court, "....this policy of limiting the classes of persons in favor of whom an action survives (is) equally inconsistent with the Federal Civil Rights Laws."

No where in Section 1988 is it stated that the Federal courts are bound by an inhospitable State law. Quite to the contrary, Section 1988 makes it implicit that the law of the State in which the Federal Court has jurisdiction, must not be inconsistent with the Constitution and laws of the United States. Nor does the Section express restrictiveness or exclusiveness.

The need to provide for survival of Civil Rights actions is particularly acute in cases such as this, where the deceased plaintiff's Federal Constitutional rights were misused and abused by a prosecuting attorney acting in concert with his co-conspirators, in bad faith, with no hope of successful prosecution of the criminal charges which the prosecuting attorney caused to be filed against him. The extent to which the prosecuting attorney, Garrison, acting in concert with his co-conspirators, including the petitioner herein, abused and misused the powers of his office of District Attorney in direct violation of the Federally guaranteed rights of Shaw, are shown with clarity in the Conclusions of Fact of Judge Christenberry in the case of *Shaw v. Garrison*, 328 F.Supp. 390.

Commenting on the Circuit Court's decision, William H. Theis, Assistant Professor of Law, Louisiana State University, said:

"The Federal Courts post-Erie Development of Federal common law, makes unlikely the survival of the assumptions codified in Section 1988. In cases other than Civil Rights cases, the trend of the decisions is to fill the gaps in Federal statutory schemes with Federal common law, or with State law, without regard to the latter's character as statutory or decisional. If State law, whatever its source, conflicts with overriding Federal policy, although not directly with a Federal statute, then it must give way. Shaw's reading of Section 1988 parallels this development found in other areas; 'inhospitable' State statutes may be discarded. It is this office's projection that any State statute, other than a statute of limitations, which inhibits plaintiff's case more than would Federal common law, will be found 'inhospitable'. Generally, state statutes have been considered only for the beneficial effect they would have on the plaintiff's case. If the Federal policy in favor of the protection of Civil Rights is a strong one, as the Federal courts frequently insist, then local concerns reflected in State statutes that stand to bar or diminish plaintiff's chances of recovery will likely give way. *Sullivan v. Little Hunting Park* clearly contemplates that all state damages rules, even those found in statutes, must give way to Federal rules, decisional as well as statutory, that better advance Federal policy."

SHAW V. GARRISON: Some observations on 42 USC Section 1988 and Federal Common Law, 36 La. Law Review, 681.

Faced with the dilemma of an inhospitable State law, and a deficient Federal statute, the trial court, as well as the circuit court, solved the dilemma by holding that the old common law of abatement was no longer controlling. It likewise found that the trend of the decisions of this court is in favor of survival of Civil Rights actions. See *Van Breck v. Sabine Towing Co.*, 300 US 342, 57 S.Ct. 452, 81 L.Ed. 685, 1937; *Just et al v. Chambers, Executrix*, 312 US 383, 61 S.Ct. 687, 85 L.Ed. 903; *Cox, et al, Administrators, et al v. Roth, Administrator*, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260, 1955.

Congress did not create enforceable Civil Rights, such as those provided for under the statutes applicable to this case, to allow the state to destroy those rights or preclude them as would be the case here, if Article 2315 of the Louisiana Civil Code is applied. To apply Article 2315 is to destroy the Civil Rights action provided for by Congressional mandate. The holding of the circuit court is just and equitable. It serves to carry out the policies of Congress in the enactment of the Civil Rights Act. It allows and permits vindication of Civil Rights and Federally guaranteed rights. It produces uniformity. The decision of the trial court, as well as that of the circuit court, allows Clay L. Shaw to Rest in Peace It allows Clay L. Shaw to have his day in court and seek to vindicate his character, his name, and his reputation which the District Attorney, Garrison, and his co-conspirator, Robertson, the petitioner herein, sought to destroy as a result of their actions against him as set forth in the com-

plaint. Louisiana Survival Law should not be allowed to abrogate the achievement of justice.

The court has the right and in fact was authorized and instructed by the Congress to fashion a remedy which would grant relief to the citizen whose Federal rights have been impaired. The common law as modified and changed by the Constitution and statutes of the forum state is to be applied, but only if it is not inconsistent with the Constitution and laws of the United States. The statute itself makes reference to the Federal common law, the existence of which is challenged by the petitioner. Section 1983 is the primary vehicle for protection of the citizen's Federally guaranteed rights. It provides a cause of action created by Congress which instructs the judiciary to apply the common law or the state law, whichever may be required in order to protect the citizen's Federal rights. The history and purpose of Section 1983 and its nature as a Federal cause of action to protect Federal Constitutional rights dictates that the courts ought to rely on state law for answers to Constitutional common law, only if that state law adequately protects the citizen's Federal rights. The state law is to be applied only if it accomplishes that purpose. Should Congress be dissatisfied with the manner in which the mandate is carried out by the courts, it has ample power to alter the judicary's answers by legislative enactment. To the extent that the court chooses to follow state law, that decision is one which embraces and incorporates State law for purposes of Federal law. The State law is not operative of its own force. Any State law which conflicts with the overriding Federal statute must give way. It is incumbent on the Federal courts to delineate the nature and substance of the citizen's rights under Section 1983. It is neither judicial fiat nor judicial lawlessness. To

the contrary, it is judicial implementation of the purposes of a very important and significant piece of Congressional legislation. In Section 1983 cases, appropriate State law serves as a convenient and easy reference point which in some, but not all, instances will settle the matter. However, should the State provision only restrict or impede the purposes of Section 1983, Federal courts may disregard the State law. The State law does not apply of its own force, but is utilized by the Federal court only if it serves to implement and carry out the intent and purposes of Section 1983. That such is the case was recognized by this court in *Sullivan v. Little Hunting Park, Inc.*, 90 S. Ct. 400 (1969), 396 US 229, wherein the court said:

> "We held in *Jones v. Alfred H. Mayer Co.* that although Section 1982 is couched in declaratory terms and provides no explicit method of enforcement, a Federal court has power to fashion an effective equitable remedy. 392 US at 414 n. 13, 88 S.Ct. at 2189. That Federal remedy for the protection of a Federal right is available in the State court, if that court is empowered to grant injunctive relief generally, as is the Virginia court. VA Code Annotated Section 8-610 (1957 Repl. Vo.)".

Again the court said:

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well gettled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 684, 66 S.Ct. at 777.

> "The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Texas & N.O.R. Co. v. Brotherhood of Railway & SS Clerks*, 38 US 548, 569-570, 50 S.Ct. 427, 433-434, 74 L.Ed. 1034. As stated in *Texas & Pacific RR Co. v. Rigsby*, 241 US 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874: 'A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied....."

In the case of *Mitchum v. Foster*, 92 S.Ct. 2151, 40 US 225, 32 L.Ed. 2d 705 (1972), the court stated:

> "Section 1983 was originally Section 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was 'modeled' on Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of 'enforcing the Provisions of the Fourteenth Amendment', 17 Stat. 13. The predecessor of Section 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendments. As a result of the new structure of law that emerged in the post-Civil War era - and especially of the

Fourteenth Amendment which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. ***Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

***

"Section 1983 was thus a product of vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of Sec. 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. Ex parte Virginia, 100 US 339, 25 L.Ed. 676 ***" *Monroe v. Pape*, 365 US 167, 81 S.Ct. 473. 5 L.Ed. 2d 492 (1961).

The district courts have held:

"***A cause of action at least for equitable relief, can be stated under Sec. 1983 against individuals whose acts under color of law result in denial of equal protection and due process..." *Lessard v. Van Dale*, 318 F.Supp. 74 (1970).

"Sec. 1983 protects only federal rights that are violated under color of state law.***That is, the plaintiff must show that the defendant, while acting under color of state or local authority, subjected to the plaintiff, or caused the plaintiff to be subjected, to the deprivation of any rights, privileges, or immunities secured to the plaintiff by the Constitution and laws of the United States.*** *Glass v. Hamilton County, Tennessee*, 363 F. Supp. 241 (1973).

"***Both 42 USC, Sec. 1983, creating a cause of action, and 28 USC, Sec. 1343(3), its jurisdictional counterpart, refer to deprivations committed by a person acting under color of State law. It has been recognized that Congress in enacting Sec. 1983 meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official abuse of his position.***" *O'Brien v. Galloway*, 362 F.Supp. 902 (1973).

"It is proper for a person adversely affected to bring an action under 42 USC Sec. 1983 on the grounds that he has been denied his rights under the equal protection clause of the constitution. The equal protection clause is directed to every form of state action - legislative, executive, or judicial.***" *Shock v. Tester*, 405 F.2d 852 (1969).

There can be no doubt that these statutes granted Clay L. Shaw the right to proceed as he did against Garrison and his co-conspirators, including Robertson, for deprivation of his Federally guaranteed rights. His fate was to die before

trial. To grant such a cause of action for protection of Shaw's Federal rights, and then not to permit a personal representative to carry on in the place and stead of the deceased, is to do a vain and useless thing. Death would destroy redress and vindication of rights. Damages suffered would be obliterated. Certainly this was not the intent of Congress.

It has long been the policy of this court to deny abatement. In many instances, the court has permitted the continuance of an action commenced by a victim who died before trial, the administrator or executor of the estate of the deceased being substituted as a party-plaintiff. Instances of the denial of abatement are present in the cases of *Van Breck v. Sabine Towing Co.*, 300 US 342, 81 L.Ed. 685, 57 S.Ct. 452 (1937); *Just, et al v. Chambers, Executrix*, 312 US 383, 85 L.Ed. 903, 61 S.Ct. 687 (1941); *Cox, et al, Administrators, et al v. Roth, Administrator*, 348 US 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955).

Again, in *Brazier v. Cherry*, supra, the Fifth Circuit stated:

> "At every turn the Supreme Court, by drawing on available state legislation or giving a broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era. In *Just v. Chambers*, 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903, the court as to the related problem of survival of the cause of action after the death of the tort-feasor held that admiralty could call upon the local (Florida) law. In *Cox v. Roth*, 1955, 348 US 207, 75 S.Ct. 242, 99 L.Ed. 260, the

> question was the survival of a claim under the Jones Act, 46 USCA Sec. 688, on the death of the tort-feasor. Since liability imposed against the vessel owner under the Jones Act rests on the incorporation of F.E.L.A. 45 U.S.C.A. Section 51 et seq. the court was faced squarely with the bald fact that the basic Act had no provision for survival against the tort-feasor. Nevertheless the dominant approach of the Court was that '***welfare legislation*** is entitled to a liberal construction to accomplish its beneficent purposes'*** What could be said of the 'extreme harshness of the old common-law rule abating actions on the death of the tort-feasor' may be more than said as to the victim and his dependents. Likewise, may it be said that this rigor of the common law 'flies in the face of the express congressional purpose to provide for 'protection of citizens against unconstitutional deprivation of their fundamental civil rights. The Court's awareness there that 'literal application of the words of F.E.L.A. would result in the denial of recovery against the personal representative of the tort-feasor' was not permitted to 'frustrate the congressional purpose'***".

II. TO APPLY AN INHOSPITABLE STATE LAW OF SURVIVAL TO RESPONDENT'S CIVIL RIGHTS ACTION UNDER SECTION 1988 IS TO DENY RESPONDENT HIS FEDERAL GUARANTEE OF EQUAL PROTECTION OF THE LAW.

The Fifth Circuit in holding that Shaw's claim against the

District Attorney and his co-conspirators did not abate has settled the question of survival and abatement and rightfully held that the claim does not abate and the substitution of Shaw's personal representative to carry on in his place and stead is the proper procedure. There must be uniformity in the protection of the citizen's rights and in the enforcement of the rights granted to the citizen under the Civil Rights Laws. Certainly it cannot be contended that there is any uniformity in the survival statutes of the various states. There being no uniformity among the various states with respect to survival and abatement, a denial of equal protection of the laws is precipitated. Article 2315 of the Louisiana Civil Code with respect to the right of survival and a personal representative is not uniform with the provisions of many other states.

It was stated in *Basista v. Weir*, 340 F.2d 74 (1965):

> "The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended."

This Court has established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of the Constitution. Invidious distinctions, however, cannot be enacted without a violation of the Equal Protection Clause, and in determining whether or not a state law violates the Equal Protection Clause, the court must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *William v. Rhodes*, 393 US 23, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968); *Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist.*, 68 S.Ct. 1224 (1973). The Constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis v. Royster*, 93 S.Ct. 1055, 1059, 35 L.Ed. 2d (1973); *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278 (1973). *See Jimenez v. Weinberger*, 94 S.Ct. 2496 (1974); *Frontiero v. Richardson*, 93 S.Ct. 1764 (1973).

Respondent submits that no legitimate state purpose or interest is manifested by applying the restricted and limited provisions of Article 2315 of the Louisiana Civil Code to him. Applying the provisions of the Article to the effect that the right to sue for damages suffered by a deceased resides in the surviving spouse and child or children, surviving father and mother of the deceased, or either of them, if the deceased left no spouse or child or children, and brothers and sisters, if the deceased left no spouse, parents or children, to the present testamentary executor, would be an unconstitu-

tional application of the Article, thus defeating the purpose of the Civil Rights Act and depriving respondent of due process and equal protection of the laws. *American Party of Texas v. White*, 94 S.Ct. 1296 (1974); *Vlandis v. Kline*, 93 S.Ct. 2230 (1973).

To decide whether a law violates the Equal Protection Clause, the court must in essence look to three things: The character of the classification in question; the individual interest reflected by the classification; and the governmental interests asserted in support of the classification. *Dunn v. Clumstein*, 405 US 330, 92 S.Ct., 31 L.Ed. 2d 274 (1972). It is therefore the duty of the courts to be watchful for constitutional rights of its citizens and against any stealthy encroachments thereon. *Coolidge v. New Hampshire*, 403 US 443, 91 S.Ct. 2022 (1971). Cf. *Central Hardward v. NLRB*, 407 US 539, 92 S.Ct. 2238, 33 L.Ed. 122 (1972). It follows that the existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan v. Little Hunting Park, Inc.*, supra. A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied. *Texas & P.R. Co. v. Rigsby*, 241 US 33, 37 S.Ct. 482, 60 L.Ed. 874 (1916).

Respondent reiterates that Section 1988 does not mandate that the law of Louisiana apply to this case in its restricted and limited provisions of survival. To the extent that there is a question as to whether the testamentary executor can be substituted as party plaintiff, respondent contends that Article 2315 of the Louisiana Civil Code is not consistent with the Constitution of the United States and the jurisprudence pertaining thereto.

Section 1982 clearly permits the testamentary executor or personal representative of the deceased to be substituted as party plaintiff and continue the action filed by the victim before his death. Clay L. Shaw had a statutory right which he exercised and which requires a remedy; the remedy can now only be secured by his executor. This is a just and equitable conclusion.

The law of Georgia provides that no action for a tort shall abate by the death of either party. It survives even in the personal representative. Georgia Code, 3-505. In *Brazier v. Cherry*, supra, the Court of Appeals for the Fifth Circuit held that a Civil Action against Georgia police officers for the wrongful death of her husband could be brought by the surviving wife as administratrix of his estate. The court stressed the right of the personal representative to proceed for damages and discussed at length the questions of abatement and survival. While the court did recognize the Georgia state law, the case must be considered and analyzed for its federal philosophy as well as its invocation of Section 1988. To deny Shaw's personal representative to interpose himself as the plaintiff in Shaw's cause of action against those who deprived him of his federally guaranteed rights under color of state law, would be to deny him his Constitutional rights of due process and equal protection of the laws.

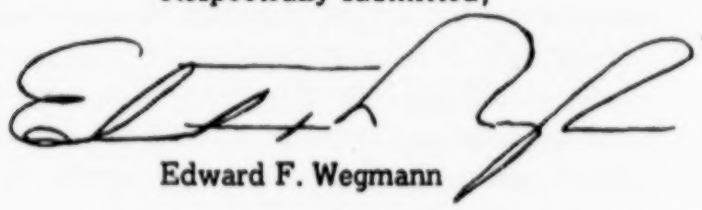
It is readily apparent from a study of the state survival statutes included in petitioner's brief as Addendum #2, page 32, et seq., that there is no uniformity whatsoever in the state survival statutes, as a result of which, if the forum state statute of survival is applied to a Section 1983 action, there is

no equal protection of the law to all citizens for the protection of their federally guaranteed rights. In Georgia, as in many other states, the action does not abate by the death of either party. It survives even in the personal representative of the decedent. Such is not the case here, if Louisiana law is applied, since the respondent, the injured party, Clay L. Shaw, resided in the State of Louisiana, and under Louisiana law, the action does not survive in his personal representative. The Fourteenth Amendment guarantees equal protection of the laws, regardless of domicile.

CONCLUSION

For the foregoing reason, it is submitted that the judgment below should be affirmed.

Respectfully submitted,



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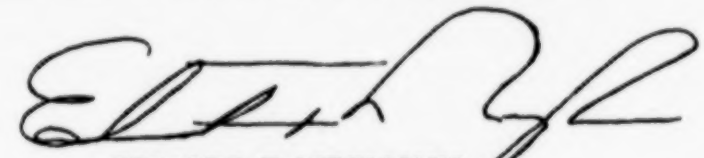
CERTIFICATE OF SERVICE

New Orleans, Louisiana
February 16, 1978

I hereby certify that I have this day served three copies of the foregoing brief, of the respondent Edward F. Wegmann, Executor for Clay L. Shaw, in response to the application of Willard E. Robertson for certiorari to the Court of Appeals for the Fifth Circuit, by placing same in the United States Mail, postage prepaid, addressed to Messrs. Malcolm W. Monroe, 47th Floor, One Shell Square, New Orleans, LA 70139; Lawrence D. Wiedemann, 841 Carondelet Street, New Orleans, LA 70112; Joseph M. Rault, Jr., 234 Loyola Avenue, New Orleans, LA 70112; Richard C. Baldwin, One Shall Square, New Orleans, LA 70139; Peter J. Butler, American Bank Building, New Orleans, LA 70130; and Jim Garrison, 710 Carondelet Street, New Orleans, LA 70130, and/or all interested individuals at their post office address.



EDWARD F. WEGMANN